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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

TIDEWATER MARINE SERVICE, INC. and WESTERN BOAT OPERATORS, INC.
Petitioners,

vs.

LLOYD W. AUBRY, JR., STATE OF CALIFORNIA LABOR COMMISSIONER, AND DIVISION OF LABOR STANDARDS ENFORCEMENT, STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES CITED		ii
I.	AUBRY'S REGULATION OF SEAMEN'S MAXIMUM HOURS OF WORK WOULD CAUSE A DIRECT CONFLICT WITH FEDERAL ADMIRALTY LAW.....	2
II.	AUBRY'S REGULATION OF SEAMEN'S MAXIMUM HOURS OF WORK WOULD HAVE WIDESPREAD EFFECT IN THE MARITIME INDUSTRY.....	5
III.	THIS CASE INVOLVES A SUDDEN CHANGE IN PRACTICE BY AUBRY, NOT A LONGSTANDING EXERCISE OF STATE JURISDICTION.....	7
IV.	CONCLUSION.....	9

TABLE OF AUTHORITIES CITED

Page(s)

Cases

Miles v. *Apex Marine Corp.*,
___ U.S. ___, 111 S.Ct. 322,
112 L.Ed.2d 275 (1990) 6

Southern Pacific Co. v. *Jensen*,
244 U.S. 205 (1917) 6

Other

Federal Rule of Civil Procedure 30(b)(6) 7

14 U.S.C. § 2 3

46 U.S.C. §§ 8101 and 8104 5

46 U.S.C. § 2103 3

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Petitioners Tidewater Marine Service, Inc. and Western Boat Operators, Inc. (collectively "Tidewater") make the following reply to the opposition brief filed by respondent Lloyd W. Aubry, Jr., *et al.* ("Aubry").

I. AUBRY'S REGULATION OF SEAMEN'S MAXIMUM HOURS OF WORK WOULD CAUSE A DIRECT CONFLICT WITH FEDERAL ADMIRALTY LAW

In his opposition brief, Aubry states that his regulation of maritime working conditions would not cause a conflict with federal admiralty law. In particular, Aubry has pointed out that the Fair Labor Standards Act (FLSA) creates exemptions for many categories of workers who are freely regulated by the states, such as employees of small newspapers, radio and television stations, and automobile dealers. According to Aubry, seamen are no different from these other categories of FLSA-exempt workers.

Aubry's argument ignores the fact that seamen are fundamentally different from newspaper workers, television announcers and the other categories of workers who are exempt from coverage under the FLSA. Unlike these other workers, seamen are subject to pervasive and uniform federal regulation of their working conditions, hours of work, compensation and benefits. Indeed, Congress has declared that

> "The Secretary [of Transportation] has general superintendence over the merchant marine of the United States and of merchant marine personnel insofar as the enforcement of this subtitle is concerned, and insofar as those vessels and personnel are not subject, under other law, to the supervision of another official of the United States Government. In the

> interests of marine safety and seamen's welfare, the Secretary shall enforce this subtitle and shall carry out correctly and uniformly administer this subtitle. The Secretary may prescribe regulations to carry out the provisions of this subtitle." 46 U.S.C. § 2103; *see also* 14 U.S.C. § 2.

This broad delegation of authority is unique to the maritime industry. No other commercial industry has an official of the United States government who exercises "general superintendence" over its employees and who is charged with the responsibility to "uniformly administer" federal law to promote their welfare. In accordance with this charge, Congress has given the Secretary of Transportation and Coast Guard broad and detailed jurisdiction over matters such as the documentation of vessels,[1] inspection of vessels,[2] regulation of vessel operations,[3] investigation and regulation of maritime accidents and casualties,[4] licensing and certification of seamen,[5] regulation of protection and relief for seamen,[6] and regulation of manning requirements and maximum hours of work for seamen.[7]

In our opening brief we discussed the Coast Guard's pervasive regulation of maximum hours of

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[1] 46 U.S.C. §§ 12101 - 12308.

[2] *Id.* §§ 3101 - 3318.

[3] *Id.* §§ 3501 - 5116.

[4] *Id.* §§ 6101 - 6307.

[5] *Id.* §§ 7101 - 7705.

[6] *Id.* §§ 10101 - 11507.

[7] *Id.* §§ 8101 - 9307.

work for seamen serving on United States documented vessels such as those operated by Tidewater. Under the authority of 46 U.S.C. Sections 8101 and 8104, the Coast Guard issues Certificates of Inspection which specify the complement of crew and maximum working hours for the specific working conditions under which a vessel is permitted to operate.[8] These Coast Guard regulations are complemented by the seamen's exemption from statutory overtime under the FLSA,[9] and longstanding provisions of federal admiralty law which treat overtime as a matter of contract between master and seaman and guarantee fair compensation for work beyond the period specified by contract.[10]

Together these provisions of federal admiralty law permit uniform regulation of seamen's maximum hours of work and working conditions. Under this federal scheme, the same standards govern seamen's work on a United States documented vessel, whether that vessel is located off the coast of California or anywhere else in the world. And as the Coast Guard officer in charge of the southern California area testified, reliance upon this federal law has created uniform and customary hours of work throughout the offshore maritime industry.[11]

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[8] *See* Tidewater's Petition for Writ of Certiorari, p. 6, n. 7-8, p. 9 & p. 29.

[9] *Id.* pp. 3-5 & pp. 19-20.

[10] *Id.* pp. 5-6.

[11] Declaration of Capt. Robert A. Janecek, USCG (Ret.), at ¶ 11, Appendix to Tidewater's Petition at A-88-89.

Aubry's attempt to prescribe seamen's maximum hours of work would necessarily disrupt this federal system by replacing the "general superintendence" of the Secretary of Transportation and Coast Guard with state land-based working standards that have nothing whatsoever to do with maritime working conditions. For this reason, Aubry's actions conflict with federal admiralty law and violate the principles of maritime uniformity which this Court has recognized in cases such as *Miles* v. *Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317, 322, 112 L.Ed.2d 275 (1990), and *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917).

II. AUBRY'S REGULATION OF SEAMEN'S MAXIMUM HOURS OF WORK WOULD HAVE WIDESPREAD EFFECT IN THE MARITIME INDUSTRY

Aubry's opposition brief has argued that his regulation of maritime working conditions would involve only a handful of seamen. He has stated that the only workers who would be affected by his regulations are California residents who work on vessels confined to local waters, and that arguments raised by Tidewater and *amici* Maritime Law Association and American Waterways Operators are based on hypothetical situations. This argument is simply wrong.

In the first place, Aubry took an entirely different position in testimony during the proceedings below. In order to determine the scope of Aubry's regulations, Tidewater took the deposition pursuant to

Federal Rule of Civil Procedure 30(b)(6) of Aubry or his designated representative.[12] Aubry responded by designating his senior deputy,[13] who testified that Aubry would exercise expansive jurisdiction that would include seamen who are non-California residents serving on vessels operating on the high seas beyond state territorial waters.[14] When Aubry tried to reverse course in the trial court in the same manner as he is attempting to do here, the District Court held that Aubry was bound by the testimony of his designated representative. 709 F.Supp. at 1521 & 1522, Appendix to Tidewater's Petition at A-53-54 & 57-58. The record is therefore clear that Aubry's purported jurisdiction over seamen is very broad indeed. That is why his actions have attracted the opposition of so many parties and *amici* from the maritime industry.

Aubry's jurisdiction would have enormous impact in the maritime industry even if it is limited to California residents employed in local waters as he has suggested. As we discussed in our opening brief, California employs more than ten percent of all maritime workers engaged in local offshore operations such as water transportation services, water passenger transportation, water ferries, marine cargo handling, and towing and tugboat services.[15] Aubry's actions would accordingly remove the longstanding seamen's

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[12] 24 CR 22-23.

[13] 24 CR 25-26.

[14] 22 CR 124-28 and 188-89.

[15] *See* discussion of Bureau of Labor Statistics data in Tidewater's Petition for Writ of Certiorari, p. 25.

exemption for more than one out of every ten offshore maritime employees in the United States.

Limiting Aubry's jurisdiction to California residents employed on vessels in California waters would still have widespread effect by causing enormous disruption to offshore maritime operations. As we pointed out in our opening brief[16] and as *amici* Maritime Law Association and American Waterways Operators have echoed,[17] crews commonly reside on their vessels and work for unpredictable periods of time, and crews are commonly composed of seamen who reside in different states. This is true even for offshore operations, such as those in which Tidewater is engaged in California.[18] Aubry's standards would accordingly force seamen to work predictable eight hour work shifts, and they would apply only to California residents while non-resident co-workers on the same vessel would be exempt.

In short, Aubry's land-based regulations completely ignore the realities of maritime trade and would impose enormous and unmanageable burdens.

III. THIS CASE INVOLVES A SUDDEN CHANGE IN PRACTICE BY AUBRY, NOT A LONGSTANDING EXERCISE OF STATE JURISDICTION

Aubry has stated that he has "historically" applied California overtime wage orders to seamen

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[16] *Id.* p. 28.

[17] *Amicus curiae* brief of Maritime Law Association, pp. 6-8; *amicus curiae* brief of American Waterways Operators, pp. 5-6.

[18] 24 CR 1-6.

residing in California, suggesting that he has had a longstanding practice of applying overtime regulations to maritime workers.[19] That is simply not so.

During the trial court proceedings below, Aubry admitted that the California Industrial Welfare Commission has not adopted any regulations or Wage Orders which address the maritime industry or seamen.[20] Aubry also admitted that the decision to extend overtime jurisdiction to seamen and the maritime industry was reached without any public proceedings, written regulations or public pronouncements to affected employers.[21] Aubry's jurisdiction is based on his application of generic, land-based wage orders to maritime employment -- not specific regulations tailored to the maritime industry.

Tidewater has operated vessels in California for nearly 30 years, and it has always scheduled vessel crews according to Coast Guard regulations. No one ever challenged Tidewater's actions until Aubry began accepting jurisdiction over seamen's overtime claims in 1987.

In short, there is nothing "historical" about Aubry's actions in this case. The decision to apply overtime regulations to the maritime industry in California was sudden and unannounced.

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[19] Aubry's Opposition Brief at 2.

[20] 24 CR 19, 38B & 38C.

[21] 24 CR 20-21.

IV. CONCLUSION

For the foregoing reasons, Tidewater's petition for writ of certiorari should be granted.

Respectfully submitted,

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